

Amendment No. 1 to HB2319

**West
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FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 50, Chapter 6, is amended by adding Sections 2 through 6 as a new part to be appropriately designated.

SECTION 2. There is hereby created the “Uninsured Employers’ Fund” established to provide workers’ compensation benefits to those employees, or dependents of employees, who sustain an injury arising out of and in the course of employment at a time when the employer was subject to the workers’ compensation law and had failed to secure payment of compensation as required by the workers’ compensation law. For purposes of this part, the term “uninsured employer” shall be deemed to refer to an employer who was subject to the workers’ compensation law and failed to insure and keep insured its liability for payment of compensation as required by the workers’ compensation law or a self-insured employer which seeks bankruptcy protection under federal law. Except however, the term “uninsured employer” shall not include employers which enter into agreements to pool their liabilities pursuant to Tennessee Code Annotated, Section 50-6-405(c).

SECTION 3. (a) The “uninsured employers fund” shall be established as an account in the general fund which shall be invested pursuant to Tennessee Code Annotated, Section 9-4-603. Moneys from the fund may be expended to fund activities authorized by this act. Any revenues deposited in this fund shall remain in the fund until expended for purposes consistent with this part, and shall not revert to the general fund on any June 30. Any appropriation from such fund shall not revert to the general fund on any June 30, but shall remain available for expenditure in subsequent fiscal years.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

(b) The fund may receive revenues that shall include all penalties assessed and collected from uninsured employers, amounts recovered from employers representing payments made by the fund to or on behalf of injured workers and any other amounts which may be appropriated.

(c) The fund shall be used to pay workers' compensation benefits to injured workers eligible for benefits under the uninsured employers fund program established by this part, for payment of any attorneys fees provided by law and for payment of expenses related to the administration of the uninsured employers fund program.

SECTION 4. (a) The commissioner of labor and workforce development shall administer the uninsured employers fund program. The commissioner shall promulgate rules and regulations to effectuate the purposes of this act. All such rules and regulations shall be promulgated in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(b) To administer the uninsured employers fund program the commissioner is authorized to retain a third party administrator by contract to administer claims under the supervision of the commissioner or commissioner's designee.

(c) To administer the uninsured employers fund program, the commissioner is authorized, with the approval of the governor and the attorney general and reporter, to retain private counsel to defend the uninsured employers' fund, to collect monetary penalties assessed against uninsured employers and to recover from uninsured employers monies paid out by the uninsured employers fund to injured employees under the uninsured employers fund program. All fees payable to private counsel shall be paid from the uninsured employers fund.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

(d) The governor, the attorney general and reporter, and the comptroller of the treasury may agree to delegate to the commissioner the authority to settle claims against the uninsured employers fund under whatever conditions the three (3) officials agree to be appropriate. The commissioner is authorized to delegate to a third party administrator such settlement authority as the commissioner deems appropriate.

(e) The commissioner is hereby granted authority to issue a subpoena to the uninsured employer, its agents or employees and to issue a subpoena for the production of books, documents, records or other tangible things which may be relevant to the investigation of a claim for benefits from the uninsured employers fund.

SECTION 5. (a) No claim for benefits from the uninsured employers fund shall be accepted by the department or paid from the uninsured employers fund for any injury which occurred prior to January 1, 2001.

(b)(1) The right to compensation from the uninsured employers fund shall be forever barred unless a notice of intent to pursue benefits is filed with the department on a form prescribed by the commissioner within one (1) year from the date of injury; provided, that if within the one (1) year period voluntary payments of compensation are paid by the employer to or on behalf of the employee or the employee's dependents, a notice of intent to pursue benefits may be filed within one (1) year from the date of the last authorized treatment or the time the employer shall cease to make such payments, whichever is later.

(b)(2) Notwithstanding the foregoing subdivision, the right to compensation from the uninsured employers fund for an injury sustained by an employee whose employer is qualified

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

AMEND Senate Bill No. 2382

House Bill No. 2319*

as self-insured pursuant to Tennessee Code Annotated, Section 50-6-405(a)(2) shall be forever barred unless the employee complies with the following procedure, as applicable:

(A) If an employee or employee's dependent(s) has a pending workers' compensation suit, pursuant to Tennessee Code Annotated Section 50-6-225, as of the date on which the self-insured employer files a bankruptcy petition in federal court, the employee or employee's dependent(s) shall have the option to seek benefits from the uninsured employers fund. In the event the employee or employee's dependent(s) elects to seek benefits from the fund, the employee shall file a notice of intent to pursue benefits with the department on a form prescribed by the commissioner accompanied by a certified copy of an order of voluntary dismissal, without prejudice, entered by the court in which the lawsuit is pending within sixty (60) days of the date upon which the employee knew or should have known the employer had filed for bankruptcy protection.

(B) If an employee or employee's dependent(s) has a pending claim for workers' compensation benefits upon which the self-insured employer has been voluntarily paying benefits as of the date on which the self-insured employer files a bankruptcy petition in federal court, the employee or employee's dependent(s) shall have the option to seek benefits from the uninsured employers fund. In the event the employee or employee's dependent(s) elects to seek benefits from the fund, the employee shall file a notice of intent to pursue benefits with the department on a form prescribed by the commissioner within sixty (60) days of

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

the date upon which the employee knew or should have known the employer had filed for bankruptcy protection.

(C) If an employee sustains an injury on a date at which time the self-insured employer has a bankruptcy petition pending in federal court, the employee or employee's dependent(s) shall have the option to seek benefits from the uninsured employers fund. In the event the employee or employee's dependent(s) elects to seek benefits from the fund, the employee or employee's dependent(s) shall file a notice of intent to pursue benefits with the department on a form prescribed by the commissioner within one hundred and twenty (120) days of the date of the injury if the employee had knowledge of the pending bankruptcy petition on the date of injury or within one hundred and twenty (120) days of the date upon which the employee knew or should have known the employer had a pending bankruptcy petition on the date of injury, whichever is later.

(c) Upon receipt of a notice of intent to pursue benefits from the uninsured employers fund the commissioner or commissioner's designee shall first determine whether the employer was subject to the workers' compensation law and whether the employer was an uninsured employer pursuant to this part as of the of injury or death or the date of the submission of the claim, whichever is applicable.

(d) If the employer is determined by the commissioner or commissioner's designee to be an uninsured employer, the injured employee shall be notified in writing of the right to pursue a claim for workers' compensation benefits from the uninsured employers fund or to pursue a

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

private cause of action against the employer for either workers' compensation benefits or for damages for personal injuries or death in a court of competent jurisdiction.

(e)(1) If the employer is determined to be an uninsured employer pursuant to this section, the injured employee or employee's dependent(s) shall be required to submit a written election of remedies to the commissioner on a form prescribed by the commissioner.

(e)(2) An election by the injured employee or employee's dependent(s) to pursue a claim for benefits from the uninsured employers fund shall constitute submission to the jurisdiction of the claims commission for (1) appeal of a denial of compensability by the uninsured employers fund program, or (2) final determination of the workers' compensation benefits to which the employee or employee's dependent(s) is entitled under the workers' compensation law of Tennessee.

(e)(3) An election by an injured employee or employee's dependent(s) to pursue a claim for benefits from the uninsured employers fund shall be deemed a waiver of the injured employee's or employee's dependent(s)' right to sue the employer for personal injury damages or for workers' compensation benefits in any court of competent jurisdiction.

(e)(4) The institution of a suit by the employee or employee's dependent(s) for personal injury damages or a suit to recover workers' compensation benefits from the employer in any court of competent jurisdiction shall be deemed a waiver of the right to claim compensation from the uninsured employers fund under this part, except in those instances in which a self-insured employer files for bankruptcy protection subsequent to the employee's or employee's dependent(s)' institution of a suit against the self-insured employer for workers' compensation benefits.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

(e)(5) Notwithstanding Tennessee Code Annotated, Section 50-6-223(a) to the contrary, an election by an employee or an employee's dependent(s) to pursue a claim for workers' compensation benefits from the uninsured employers fund shall operate as an assignment of all rights the employee may have to recover workers' compensation benefits against the uninsured employer, including any right the employee may have to enforce a claim against the securities or bond deposited with the commissioner of commerce and insurance by a self-insured employer pursuant to Tennessee Code Annotated, Section 50-6-405.

(e)(6) The election of remedies form prescribed by the commissioner shall contain an explanation of the waiver provisions of this section.

(f)(1) Upon receipt of the written election by the employee or employee's dependent(s) to pursue a claim for benefits from the uninsured employers fund, the commissioner or commissioner's designee shall make a determination as to whether the claim is compensable under the workers' compensation law. If the claim is determined to be compensable, the uninsured employers fund shall be liable for all workers' compensation benefits to which the employee is entitled under the workers' compensation law. The uninsured employers fund shall be entitled to contest any claims made by the employee, including, but not limited to, the medical care and treatment to which the employee is entitled and the type and degree of disability benefits to which the employee is entitled.

(f)(2) If, following a show cause hearing by the commissioner or commissioner's designee to determine whether the employer is required to secure payment of compensation as required by the workers' compensation law pursuant to this chapter, it is finally determined following all levels of appeal, that the employer was not required to secure payment of

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

compensation, the commissioner shall so notify the uninsured employers fund and the uninsured employers fund shall have no further obligation to pay workers' compensation benefits to the employee. In such cases, the Uninsured Employers' Fund shall not be entitled to recover from the employer the workers' compensation benefits paid by the uninsured employers fund.

(g) To settle claims against the uninsured employers fund the provisions of Tennessee Code Annotated, Sections 50-6-236, 50-6-237 and 50-6-239 shall apply. Settlements involving both periodic payments and lump sum payments by the uninsured employers fund shall be submitted for approval pursuant to Tennessee Code Annotated, Section 50-6-206(c)(1). Settlements involving lump sum payments of compensation for permanent disability and/or future medical benefits may be approved in appropriate cases. Attorneys fees may be paid as a partial lump sum from any settlement approved pursuant to Tennessee Code Annotated, Section 50-6-206(c)(1). Tennessee Code Annotated, Section 50-6-229 shall not apply to the uninsured employers fund.

(h)(1) If, following an election by an employee or employee's dependent(s) to pursue benefits from the uninsured employers fund, it is determined pursuant to this section that the claim is not compensable, the employee or employee's dependent(s) shall have the right to file a claim for workers' compensation benefits against the uninsured employers fund in the claims commission.

(h)(2) If a claim for benefits from the uninsured employers fund is not settled through mediation, the employee or employee's dependent(s) shall have the right to file a claim for

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

AMEND Senate Bill No. 2382

House Bill No. 2319*

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

workers' compensation benefits against the uninsured employers fund in the claims commission.

(h)(3) The procedures applicable to claims against the state shall apply to any claims filed in the claims commission against the uninsured employers fund.

SECTION 6. (a) When a notice of intent to pursue benefits is received by the commissioner or commissioner's designee and it is determined at the time of the injury the employer was an uninsured employer for purposes of this part, the uninsured employers fund shall have the authority to file a *lis pendens* or any other notice of lien which is authorized by law to any potential creditor, in any county in which the employer shall have property. In the event the uninsured employers fund pays benefits to or on behalf of the injured employee or employee's dependent(s) the uninsured employers fund shall have a lien against the assets of the employer to the full extent of all benefits paid to or on behalf of the injured employee or employee's dependent(s), all costs, and all expenses incurred by the Uninsured Fund as a result of an injury to an employee of an uninsured employer. The uninsured employers fund shall have the authority to file a notice of lien with the clerk of court in any county in which the employer has assets.

(b) The uninsured employers fund shall have a cause of action against the uninsured employer in a court of competent jurisdiction to recover all benefits, costs and expenses paid or incurred by the uninsured employers fund, and/or ordered by the claims commission to be paid by the uninsured employers fund as a result of an injury to an employee of the uninsured employer. The commissioner is authorized to issue a subpoena to the uninsured employer, its agents or employees to require the giving of a sworn statement pertaining to and related to any

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

assets owned by the uninsured employer. The commissioner is authorized to issue a subpoena for the production of books, documents or other tangible things related to assets owned by the uninsured employer.

(c) The uninsured employers fund shall not have a cause of action against an employer to recover any benefits paid to or on behalf of an employee if it is determined pursuant to this chapter, after all applicable appeal processes, that the employer was not an “uninsured employer” as of the applicable date of inquiry.

SECTION 7. Tennessee Code Annotated, Section 50-6-118 is amended by deleting subsection (b) in its entirety and by substituting instead the following language:

(b) All penalties collected by the department for an employer’s failure to provide workers’ compensation coverage or qualify as a self-insurer shall be paid into and become a part of the uninsured employers fund. All other penalties collected by the department shall be paid into and become a part of the second injury fund.

SECTION 8. Tennessee Code Annotated, Section 50-6-405(b)(1) is amended by deleting the second sentence of the subsection in its entirety and by substituting the following language immediately after the first sentence of the subsection:

The securities or bond shall be held by the commissioner of commerce and insurance and be conditioned to run directly for the benefit of: (1) employees who elect to pursue a cause of action for workers’ compensation against their employer in a court of competent jurisdiction and may be enforced by them directly in an action in their name; and (2) the uninsured employers fund to recover any and all benefits and expenses paid by the fund as a result of a self-insured

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

AMEND Senate Bill No. 2382

House Bill No. 2319*

employer's financial inability to pay claims of its employees for workers' compensation benefits and may be enforced by it directly in an action in its name.

SECTION 9. Tennessee Code Annotated, Section 50-6-412 is amended by deleting the section in its entirety and by substituting instead the following language.

(a) The commissioner of the department of labor and workforce development or the commissioner's designee shall have the authority to issue a subpoena to require an employer doing business in the state of Tennessee to produce any and all books, documents or other tangible things which may be relevant or reasonably calculated to lead to the discovery of relevant information necessary to determine whether an employer is subject to the workers' compensation law, to determine whether an employer has secured payment of compensation pursuant to the workers' compensation law, and/or to determine the amount of any monetary penalty which is required to be assessed against an employer for failure to secure payment of compensation pursuant to the workers' compensation law.

(b)(1) All monetary penalties assessed pursuant to this section which are based on the average yearly workers' compensation premium shall be calculated by utilizing the appropriate assigned risk plan advisory prospective loss cost and multiplier for such an employer as of the date of determination the employer is subject to the workers' compensation law and has not secured payment of compensation pursuant to the workers' compensation law.

(b)(2) If the commissioner or commissioner's designee determines the period of noncompliance with the workers' compensation law is less than one year, any assessed monetary penalty shall be prorated; however, the monetary penalty shall not be less than an

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

amount equal to one (1) month's premium of the average yearly workers' compensation premium for such an employer based on the appropriate assigned risk plan rating values.

(b)(3) If any monetary penalty assessed against an employer is held in abeyance pursuant to this section, the period of abeyance shall be two (2) years. Any abated penalty becomes void upon the expiration of the two (2) year period, provided the employer remained subject to the workers' compensation law during the two (2) year period and continuously secured payment of compensation as required by law. Any abated penalty becomes voidable, if within the two (2) year period, the employer provides notice to the commissioner that the employer is no longer subject to the workers' compensation law and upon concurrence of the commissioner that the employer is no longer subject to the workers' compensation law, the penalty shall become void. Any abated penalty shall become due and payable immediately if, within the two (2) year period, the employer continues to be subject to the workers' compensation law and fails to secure payment of compensation as required by law,.

(b)(4) The commissioner shall advise an employer of the amount of any assessed monetary penalty in writing and shall include the date on which the monetary penalty shall be due and payable.

(c)(1) When the records of the department of labor and workforce development indicate, or when the department's investigation of an employer indicates, that an employer is subject to the workers' compensation law and has failed to secure payment of compensation as required by the workers' compensation law, the department shall so notify the employer by certified letter, return receipt requested.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

(c)(2) The department shall require the employer to provide, within ten (10) days, excluding Saturdays, Sundays, and holidays, of the receipt of the certified letter, either proof that the employer had secured payment of compensation as required by the workers' compensation law or a sworn affidavit, with supporting documentation, that the employer is exempt from the workers' compensation law.

(c)(3) The certified letter shall also advise the employer of the monetary penalties which may be assessed against the employer if it is determined by the commissioner or commissioner's designee that the employer has failed to secure payment of compensation as required by the workers' compensation law and shall advise the employer of the criminal penalties to which the employer may be subject for such failure.

(d)(1) If the employer responds to the certified letter within ten (10) days, excluding Saturdays, Sundays, and holidays, of its receipt and it is determined by the commissioner or commissioner's designee that the employer has secured payment of compensation as required by the workers' compensation law or that the employer is not subject to the workers' compensation law, no monetary penalty shall be assessed.

(d)(2) If the employer responds to the certified letter within ten (10) days, excluding Saturdays, Sundays, and holidays, of its receipt and it is determined by the commissioner or commissioner's designee that the employer is subject to the workers' compensation law and that the employer has secured the payment of compensation since the date of receipt of the certified letter, the commissioner shall issue a monetary penalty to the employer equal to one and one-half (1½) times the average yearly workers' compensation premium.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

(e)(1) If the employer fails to respond to the certified letter within ten (10) days, excluding Saturdays, Sundays and holidays, of its receipt or the employer responds to the certified letter but does not provide a verifiable sworn affidavit of exemption, the commissioner or commissioner's designee shall issue a "Show Cause Order and Notice of Hearing" which shall be sent to the employer by certified mail, return receipt requested, to the employer's last known address, according to department records. If either of these circumstances occur, the commissioner shall also assess two penalties. The first monetary penalty shall be equal to one and one half (1½) times the average yearly workers' compensation premium. The second monetary penalty shall be equal to the average yearly workers' compensation premium for such employer.

(e)(2) The "Show Cause Order and Notice of Hearing" shall notify the employer of all monetary penalties which have been assessed against the employer and the criminal penalties to which the employer may be subject.

(e)(3) The "Show Cause Order and Notice of Hearing" shall advise the employer it must appear at the show cause hearing before the commissioner or commissioner's designee to show cause why it should not be held to be in violation of the workers' compensation law by its failure to secure compensation as required by the workers' compensation law.

(e)(4) The employer shall have the burden of proof at the show cause hearing and shall be required to produce documentary evidence that the employer is not subject to the workers' compensation law or that the employer was in compliance with the workers' compensation law.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

FILED

Date _____

Time _____

Clerk _____

Comm. Amdt. _____

AMEND Senate Bill No. 2382

House Bill No. 2319*

(e)(5) The department shall schedule the show cause hearing in a timely manner, not to exceed sixty (60) days from the date of the employer's receipt of the first certified letter sent pursuant to Section 1(c) herein.

(f)(1) If the commissioner or commissioner's designee determines at the show cause hearing that the employer is not subject to the workers compensation law or that the employer had secured and continues to secure payment of compensation as required by the workers' compensation law, all monetary penalties shall be void.

(f)(2) If the employer appears at the show cause hearing and it is determined by the commissioner or commissioner's designee that the employer is subject to the workers' compensation law and that the employer has come into compliance with the workers' compensation law by securing payment of compensation prior to the date of the show cause hearing, the first monetary penalty equal to one and one half (1½) times the average yearly workers' compensation premium shall be due; however, the second monetary penalty equal to the average yearly workers' compensation premium shall be held in abeyance.

(f)(3) If the employer appears at the show cause hearing and it is determined by the commissioner or commissioner's designee that the employer is subject to the workers' compensation law and that the employer has not secured payment of compensation as required by the workers' compensation law, the employer shall be ordered to procure workers' compensation insurance coverage and to provide the department with proof of coverage within five (5) days of the issuance of the order, excluding Saturdays, Sundays and holidays. If the employer obtains workers' compensation insurance coverage and provides the department with proof of coverage as ordered, the first monetary penalty equal to one and one-half (1 ½) times

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

AMEND Senate Bill No. 2382

House Bill No. 2319*

the average yearly workers' compensation premium shall be due; however, the second monetary penalty equal to the average yearly workers' compensation premium shall be held in abeyance.

(f)(4) If the employer fails to obtain workers' compensation insurance coverage as ordered by the commissioner or commissioner's designee within the required time period, all monetary penalties, totaling two and one-half (2 ½) times the average yearly workers' compensation premium, shall be immediately due and payable.

(g)(1) The commissioner shall have the authority to seek an injunction in the Chancery Court of Davidson County, Tennessee to prohibit an employer from operating its business in any way until the employer has complied with an order by the commissioner or commissioner's designee to obtain workers' compensation insurance coverage.

(g)(2) In the event an employer shall fail to comply with the requirements of the workers' compensation law by failing to secure payment of compensation on a second or subsequent occasion, the commissioner shall have the authority to seek an injunction in the Chancery Court of Davidson County Tennessee to prohibit the employer from operating its business in any way until the employer provides proof that it has complied with the workers' compensation law by securing payment of compensation.

(h) The employer shall have the right to appeal, pursuant to the Tennessee Administrative Procedures Act, any decision made by or order issued by the commissioner or commissioner's designee pursuant to this section.

Amendment No. 1 to HB2319

**West
Signature of Sponsor**

AMEND Senate Bill No. 2382

House Bill No. 2319*

SECTION 10. This act shall become effective upon July 1, 2000, the public welfare requiring it; provided that the provisions of Section 9 shall be effective for violations which occur on or after January 1, 2001.

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____
